Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band	)	IB Docket No. 01-185
	)	
Amendment of § 2.106 of the FCC's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service	)	ET Docket No. 95-18

To: The Commission

JOINT REPLY COMMENTS OF CINGULAR WIRELESS AND VERIZON WIRELESS

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SUMMARY

The weight of the comment record in this proceeding supports the positions of Cingular and Verizon Wireless that (i) the proposed authorization of terrestrial operations to MSS providers is contrary to Section 309(j) of the Communications Act; and (ii) it is not reasoned decisionmaking to propose preferential treatment to bolster MSS businesses only weeks after determining that MSS licensees should succeed or fail on their own merits. In fact, most commenters have identified serious flaws, on several legal, technical and/or public interest grounds, in the Commission's proposals to implement MSS flexibility.

Significantly, only a handful of MSS proponents addressed Section 309(j)'s requirement to auction spectrum, arguing that affording terrestrial use rights to existing MSS licensees creates no mutual exclusivity triggering the statute. These arguments ignore the real point. Section 309(j) is violated where the Commission fundamentally changes the manner in which spectrum can be used shortly after licensing, where such a change would have likely created mutual exclusivity in the first place. Such an end-run around the auction statute is also contrary to the public interest. The majority of commenters addressing the issue agree also that the ORBIT Act does not alter this analysis because it is clearly inapplicable to spectrum "used for" domestic terrestrial service offerings.

Arguments that prior Commission policy supports allowing terrestrial authority for MSS licensees are unpersuasive. Section 303(y) is not applicable here because this is not a spectrum allocation proceeding. The appropriate context within which to apply Section 303(y) would be in a proceeding to reexamine whether the original 70 MHz MSS allocation remains justified in light of changed circumstances. Even assuming Section 303(y) did apply, MSS flexibility is not warranted because it is contrary to the public interest of putting spectrum to its highest and most efficient use and many commenters raise serious technical concerns about the possibility of interference resulting from such flexible use. Prior Commission policy also does not support a grant of flexibility to MSS so soon after licensing. The cases cited by MSS proponents generally afforded flexibility to well-established services – not a nascent industry – or provided for flexibility during the allocation phase prior to licensing.

Not surprisingly, most commenters that support the Commission's proposal to grant MSS licensees the flexibility to offer terrestrial services are either the licensees or their investors. Even one of the few supporting commenters outside the community of recent licensees admits that authorizing these services outside Section 309(j) raises "legitimate concerns" that MSS operators will have an unfair advantage over CMRS providers who were required to purchase their licenses at auction. Perhaps more notable is that one MSS licensee, Iridium, actually *opposes* the grant of flexibility, asserting that granting flexibility to MSS licensees "will all but ensure that few, if any, of the recently authorized 2 GHz MSS systems will ever be built."

In sum, it is contrary to Section 309(j) to award terrestrial service rights to MSS licensees other than through auction. It is also not reasoned decisionmaking to consider the issues in this proceeding until the Commission first resolves whether the original 2 GHz MSS allocation remains justified given changed circumstances.

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JOINT REPLY COMMENTS OF CINGULAR WIRELESS AND VERIZON WIRELESS

Cingular Wireless LLC ("Cingular") and Verizon Wireless hereby reply to those comments submitted in response to the Commission's *Flexible Use Notice* in this proceeding.[1] In their joint comments, Cingular and Verizon Wireless demonstrated that the proposed authorization of terrestrial operations to MSS providers is contrary to Section 309(j) of the Communications Act. Moreover, Commission adoption of the proposed action would be unreasoned decisionmaking because, only weeks after the Commission decided that MSS providers should succeed or fail on their own merits, the Commission would be reversing course to prop-up MSS licensees for no reason. The weight of the comment record in this proceeding supports the positions put forward by Cingular and Verizon Wireless in their joint comments.

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[1] *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band and the 1.6/2.4 GHz Band; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, IB Docket No. 01-185 & ET Docket No. 95-18, *Notice of Proposed Rulemaking*, FCC 01-225 (rel. Aug. 17, 2001), *summarized*, 66 Fed. Reg. 47621 (Sept. 13, 2001) ("*Flexible Use Notice*").

In fact, most commenters have identified serious flaws, on several legal, technical and/or public interest grounds, in the Commission's proposals to implement MSS flexibility. At a minimum, most commenters believe that the Commission must ensure that what the licensees are permitted to do is truly ancillary.[2] Furthermore, many raise serious technical concerns about the possibility of interference between such terrestrial services and the primary use of the band.[3]

Not surprisingly, most commenters that support the Commission's proposal to grant MSS licensees the flexibility to offer terrestrial services are either the licensees or their investors.[4] Even one of the few supporting commenters outside the community of recent licensees admits that authorizing these services outside Section 309(j) raises "legitimate concerns" that MSS operators will have an unfair advantage over CMRS providers who were required to purchase their licenses at auction.[5] Perhaps more notable is that one MSS licensee, Iridium, actually

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[2] *See e.g.,* Comments of AT&T Wireless Services, Inc. ("AT&T Wireless") at 3; American Petroleum Institute ("API") at 5; Boeing Company ("Boeing") at 5-6; Comtech Mobile Datacom Corporation ("Comtech") at 3; Cellular Telecommunications & Internet Association ("CTIA") at 5-6; Association for Maximum Service Television, Inc. and the National Association of Broadcasters ("MSTV/NAB") at 14-16; Mobile Satellite Users Association ("MSUA") at 5.

[3] *See e.g.,* Comments of MSTV/NAB at 15; Society of Broadcast Engineers, Inc. ("SBE") at 7-10; *see also* Stratos Mobile Networks (USA) LLC and Marinesat Communications Networks, Inc. ("Stratos//Marinesat") at 8-9; Aviation Industry Parties at 8-9; Inmarsat Ventures PLC ("Inmarsat") at 12-16; Telenor Broadband Services AS ("TBS") at 6-7

[4] *See generally* Comments of Celsat America, Inc. ("Celsat"); Constellation Communications Holdings, Inc. ("Constellation"); Loral Space and Communications Ltd. ("Loral"); Mobile Communications Holdings, Inc. ("MCHI"); Motient Services, Inc., TMI Communications and Company, Limited Partnership, and Mobile Satellite Ventures Subsidiary LLC ("Motient/TMI"); New ICO Global Communications ("New ICO"); Unofficial Bondholders Committee of Globalstar, L.P. ("Globalstar Bondholders").

[5] *See* Comments of Progress & Freedom Foundation ("PFF") at 10.

opposes the grant of flexibility, asserting that granting flexibility to MSS licensees "will all but ensure that few, if any, of the recently authorized 2 GHz MSS systems will ever be built."[6]

I. MSS PROPONENTS FAIL TO SHOW WHY MSS SPECTRUM MADE AVAILABLE FOR TERRESTRIAL USE NEED NOT BE AUCTIONED.

A. Section 309(j) Is Clearly Controlling.

The handful of commenters supporting exclusive terrestrial use rights for MSS licensees addressed only superficially the implications of Section 309(j) of the Communications Act.[7] These commenters note that Section 309(j) applies "only if there are mutually exclusive applications for initial licenses."[8] Because the Commission "has already issued MSS system licenses in a manner that avoids mutual exclusivity,"[9] they argue that affording terrestrial rights to current MSS licensees creates no mutual exclusivity and thus Section 309(j) does not apply. Similarly, they contend that "directly link[ing]" ancillary terrestrial license rights to the outstanding MSS authorizations[10] does not amount to a "grant of initial licenses"[11] that would trigger the competitive bidding obligation of Section 309(j). These arguments ignore the basic fact that Section 309(j) would be violated if, *after* licensing MSS systems in a way that avoided mutual exclusivity, the Commission would then create the conditions that would otherwise attract mutually exclusive applications.

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[6] Comments of Iridium Satellite LLC ("Iridium") at 2.

[7] *See, e.g.,* Comments of Constellation; Loral; Motient/TMI.

[8] Comments of Loral at 10; *see* Constellation at 21; Motient/TMI at 36.

[9] Comments of Constellation at 21.

[10] Comments of Constellation at 21; *see* Motient/TMI at 35.

[11] Comments of Loral at 10.

Clearly, no party disputes that multiple competing applications would be filed for any spectrum made available for terrestrial mobile use given the "overwhelming demand for spectrum."[12] In such a case, Section 309(j) mandates that the Commission "*shall* grant the license or permit to a qualified applicant through a system of competitive bidding."[13] Auctions can be avoided under Section 309(j) "only if the Commission determines that mutual exclusivity would not be in the public interest," as AT&T Wireless correctly notes.[14] Attempts "to avoid mutual exclusivity" go too far if doing so "would defeat the overall goals of [the] auction statute itself."[15]

There are many reasons why avoiding mutual exclusivity is contrary to the public interest because it would defeat the goals of the auction statute.[16] First, it is contrary to the goal of

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[12] Comments of AT&T Wireless at 14; *see* Joint Comments of Cingular Wireless and Verizon Wireless (Cingular/Verizon Wireless") at 9 & n.23, 20-23; CTIA at 14-15; Telephone and Data Systems, Inc. ("TDS") at 10-11; *see also* Stratos/Marinesat at ii ("Stratos acknowledges that a significant market exists for terrestrial mobile services and does not dispute the fact that this market is significantly larger than the market for MSS.").

[13] 47 U.S.C. § 309(j)(1) (emphasis added).

[14] Comments of AT&T Wireless at 14 (citing 47 U.S.C. § 309(j)(1), (6)(E)). The legislative history of the 1993 Budget Act, which added Section 309(j)(6)(E), indicates that Congress intended the Commission to use tools that avoid mutual exclusivity in the public interest only "when feasible and appropriate." H.R. Rep. No. 103-111, at 258-259 (1993).

[15] *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, IB Docket No. 95-168, *Report and Order*, 11 F.C.C.R. 9712, 9771 (1995), *aff'd sub nom. DIRECTV, Inc. v. FCC*, 110 F.3d 816 (1997), *cited in* Comments of Cingular/Verizon Wireless at 9. Loral's suggestion that parties opposed to the exclusive grant of terrestrial rights to satellite licensees confuse "the policy justifications underlying auctions" with "the circumstances which require use of competitive bidding" is therefore misplaced. *See* Comments of Loral at 11. Compliance with the goals of the auction statute is directly relevant to a determination of whether competitive bidding is required.

[16] *See generally* 47 U.S.C. § 309(j)(3)(A)-(D) (setting forth the purposes Section 309(j)).

letting the market decide the success or failure of new products or technologies,[17] which was a crucial factor cited by the International Bureau (the "Bureau") in granting the MSS licenses.[18] Second, as Iridium warns, it would "result in the unjust enrichment" of MSS licensees like New ICO while "depriv[ing] the U.S. treasury of much needed revenue."[19] Third, it would artificially limit the number of applicants to provide terrestrial services, rather than allowing a wide variety of applicants to compete for the spectrum at auction.[20] Fourth, it ignores evidence that the highest and most efficient use of the spectrum is not that provided by MSS operators.[21] And

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[17] *E.g., Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses,* WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 F.C.C.R. 16436, 16447 (1997) (noting that the Commission should not engage in "picking winners and losers on an unsupportable basis," but rather should let "the marketplace determin[e] winners based upon an auction" in order to "put licenses into the hands of those who value them the most"), recon. 13 F.C.C.R. 8345 (1998), *aff'd sub nom. U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000); *see* Comments of SBE at 2 ("[It] is *not* the Commission's job, nor is it in the public interest, to provide a crutch for any commercial venture that cannot stand on its own."); PFF at 8 ("[G]overnment agencies are not well-suited to . . . 'pick winners.'"); AT&T Wireless at 15, CTIA at 12.

[18] *E.g., ICO Services Limited*, DA 01-1635 at ¶ 31 (rel. Jul. 17, 2001) ("*ICO Services*") (holding that MSS applicants "should be given the opportunity to succeed or fail in the market on their own merits"), *app. for review pending*.

[19] *See* Comments of Iridium at 5; *cf.* 47 U.S.C. § 309(j)(3)(C) (the Commission should avoid unjust enrichment and recover for the public the value of the public spectrum resource); *see also* Comments of SBE at 1-2; CTIA at 8-9; AT&T Wireless at 15.

[20] *Cf.* 47 U.S.C. § 309(j)(3)(B) (the Commission should avoid the excessive concentration of licenses and disseminate them among a wide range of applicants).

[21] *Cf. TPS Utilicom, Inc., Request for Waiver*, DA 01-1833, *Order*, ¶ 9 (rel. July 31, 2001) (noting that licenses should be assigned by auction to those who place the highest value on the use of the spectrum, as such entities are presumed to be those best able to put the licenses to their most efficient use) (citing 47 U.S.C. § 309(j)(3); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 F.C.C.R. 2348, 2358, 2361 (1994)); *see generally* Comments of Cingular/Verizon Wireless at 19-23. MSS licensees have admitted that as licensed they will not use spectrum efficiently.
(continued on next page)

fifth, contrary to the assertions of MSS proponents, it will not speed service to rural and underserved areas,[22] but in all probability will speed duplicative urban service at the expense of service to rural and underserved areas.[23]

Moreover, the *Flexible Use Notice*'s proposal would create a new terrestrial offering that would go far beyond mere ancillary service to the existing MSS licenses. In effect, the Commission would be authorizing a new service offering – something that would normally require an application deemed "initial" under Section 309(j).[24] Section 309(j)(1)'s restriction to applications for initial licenses was generally meant to exclude renewal and most modification

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Comments of Celsat at 9 (noting that without terrestrial authority, "spectrum will lie fallow"); *Flexible Use Notice* at ¶ 59 (citing statements by New ICO that spectrum will "lie fallow" in urban areas without terrestrial authority); *see also* PFF at 13 (spectrum will be "vastly underutilized" as licensed).

[22] *Cf.* 47 U.S.C. § 309(j)(3)(A) (the Commission should promote the rapid deployment of service to the public, including rural areas).

[23] *See* Comments of Iridium at 2 ("[A]doption of ICO's proposal for the 2 GHz band will not result in the public interest benefits proffered by ICO."); Aviation Industry Parties at iii & Stratos/Marinesat at ii (affording MSS licensees terrestrial rights could jeopardize rural MSS service by diverting resources to urban areas). Commenters note that it is unlikely that MSS licensees would realize sufficient revenues from providing service to urban areas to cross-subsidize service to service to rural areas given the competitive CMRS market in urban areas. *See* Comments of CTIA at 12-13 & nn. 37-38; Cingular/Verizon Wireless at 15-16 n.48; *Alenco, Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000) ("[I]n a competitive environment, a carrier that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers.") (quoting *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999)); *see also* AT&T Wireless at 16. Commenters also question whether such subsidized service to rural areas is warranted where "existing CMRS providers are already moving to meet the needs of rural consumers." *Id.*; *see* Comments of TDS at 12 ("All available evidence indicates that rural areas will be better served by allocating more spectrum to 3G than by continuing a decade-long failed effort to establish MSS.").

[24] *Cf.* 47 U.S.C. § 308.

applications from the auction process.[25] The Commission has indicated, however, that "if a modification is 'major,' *i.e.*, one that substantially alters a licensee's currently authorized facilities," such an application should be treated as an initial application subject to competitive bidding if mutually exclusive with other application(s).[26] Based on the record here, there is no question that the proposed terrestrial service is not merely ancillary, but will in fact "substantially alter[]"[27] the service MSS licensees are authorized to provide.

Perhaps the most telling indication that New ICO's proposed terrestrial service is a wholly new offering is that its terrestrial service will not share spectrum with its satellite service.[28] As the *Flexible Use Notice* and many commenters recognize, terrestrial and satellite channels would be assigned non-overlapping spectrum, and most urban terrestrial subscribers would complete calls without ever using a satellite.[29] In addition, the terrestrial service would operate on a physically separate network using cellular technologies, and would necessitate new

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[25] *See Implementation of Sections 309(j) and 337 of the Communications*, WT Docket No. 99-87, *Notice of Proposed Rulemaking*, 14 F.C.C.R. 5206, 5210 (1999) (citing H.R. Rep. No. 103-111, at 253 (1993)).

[26] *Id*. (quoting *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 F.C.C.R. 2348, 2355 ¶ 38 (1994)).

[27] *Id*.

[28] *E.g*., Comments of CTIA at 5.

[29] *Flexible Use Notice* at ¶ 11; Comments of AT&T Wireless at 2, 5; Cingular/Verizon Wireless at 16; Rural Cellular Association ("RCA") at 2-3; Wireless Communications Division of the Telecommunications Industry Association ("WCD/TIA") at 2-4. Such separation appears to be a critical component of the proposal in order to mitigate harmful interference and to permit the successful use of dual-mode phones, and is therefore not something the Commission can preclude by regulation. *See id.* at 3.

technical rules that the Commission has proposed to model after the PCS rules.[30] The result is the *de facto* reallocation of those frequencies for private gain and no public interest benefit.

At the same time, the very nature of both New ICO's and Motient's proposals – whereby the urban terrestrial operations would generate the majority of the revenues to sustain the MSS providers, while the satellite operations would draw minimal revenues and generate most of the system's costs – makes it clear that, if anything, satellite operations will become ancillary to terrestrial operations.[31] In other words, terrestrial service will become the "tail wagging the dog."[32] As one commenter correctly notes, "[b]ecause the proposed services would be materially different from the licensed satellite services, this alternative use cannot be justified as 'ancillary' and should, therefore, be prohibited."[33]

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[30] *See* Comments of RCA at 2-3, *Flexible Use Notice* at ¶ 34.

[31] *See* Comments of Iridium at 8 ("As a practical matter, the ICO satellite system will be ancillary to the Nextel terrestrial network, regulatory constraints to the contrary notwithstanding."); *see also* AT&T Wireless at 5-6; *compare* Boeing at 7 (warning that "[a]s the terrestrial component grows, an effect could be that the MSS component of the service would provide less and less of the overall system capacity, essentially vacating the spectrum to the terrestrial component").

[32] Comments of SBE at 1; *see* Comtech at 3-4; MSUA at 5.

[33] Comments of RCA at 3-4. Indeed, the FCC has long treated terrestrial and satellite offerings as materially different. For example, the FCC has declined to impose E-911, number portability, or spectrum cap requirements on satellite providers. *See, e.g., Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Memorandum Opinion and Order,* 12 F.C.C.R. 22665, 22706-07 (1997); *Telephone Number Portability,* CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8352, 8433-34 (1996); *see also BellSouth Corp. v. FCC*, 162 F.3d 1215, 1219 (D.C. Cir. 1999) ("The Commission also excluded Mobile Satellite Service ('MSS') from the [spectrum] cap, in view of the differences between satellite and terrestrial service . . . .").

In sum, if the FCC were to allow the provision of terrestrial service under the guise of flexible use, it would in fact be authorizing an entirely new service. Such a fundamental change in the nature of the service would alter who would apply for that service. Had the Commission initially accepted applications to provide a terrestrial offering apart from the satellite-only service that was licensed, the applicant pool would have been vastly different and involved mutually exclusive applications.[34] To rely on a prior finding of no mutual exclusivity, based upon facts no longer in existence, to avoid compliance with Section 309(j) is "no more than an end-run around the statutory scheme" and should not be countenanced.[35] Accordingly, any spectrum made available for terrestrial use must be awarded by competitive bidding to all interested parties.

B. The ORBIT Act Is Not Applicable to Terrestrial Use.

Loral and Constellation assert that Section 647 of the ORBIT Act precludes the auctioning of spectrum used by MSS licensees to provide "ancillary" terrestrial services.[36] Section 647 provides that "the Commission shall not have the authority to assign by competitive bidding orbital location or spectrum *used for the provision of international or global satellite communications services*."[37] Despite the fact that the clear language of the statute states that the

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[34] *See* Comments of Cingular/Verizon Wireless at 8-9.

[35] *Burlington Northern R.R. v. Surface Transp. Bd.*, 75 F.3d 685, 694 (D.C. Cir. 1996); *see* Comments of API at 5 (cautioning that "MSS providers could phase out all satellite service and simply become terrestrial licensees, thereby making an end run around Section 309(j) and obtaining an unfair advantage over terrestrial service providers that obtained their authorizations through competitive bidding").

[36] *See* Comments of Constellation at 21-22; Loral at 15.

[37] Open-Market Reorganization for the Betterment of International Telecommunications Act ("ORBIT Act"), Pub. L. No. 106-180, § 647, 114 Stat. 48, 57 (2000) (*codified at* 47 U.S.C. § 765(f)) (emphasis added).

auction limitation applies only to spectrum "used for" international satellite service,[38] Loral contends that the ORBIT Act exemption applies to MSS spectrum "[e]ven if used for some terrestrial service."[39] Constellation similarly asserts that the ORBIT Act exemption "is not affected by a grant [of] flexibility to MSS authorized providers to use the spectrum for ancillary terrestrial services."[40] Neither party offers *any* support for their assertions. There is none.

The ORBIT Act expressly applies to spectrum *used for* – not allocated to – international satellite service. It has no applicability to spectrum which can be technically segregated and used for domestic terrestrial service.[41] In fact, the Commission made this very distinction less than a year ago in addressing a proposal by Northpoint Technology Ltd. to operate a new terrestrial service on a secondary basis over spectrum allocated to the broadcast satellite service. Northpoint contended that the ORBIT Act prohibition extended not just to spectrum used for global satellite services, but also to all other services that may use such spectrum, including terrestrial service. The Commission disagreed, finding:

> We do not agree with Northpoint's construction of the ORBIT Act, because the statute does not prohibit the Commission from auctioning licenses for non-satellite services. Thus, where we establish a terrestrial service, as we propose to do here, the ORBIT Act is not a bar to auctioning licenses to provide that service

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[38] *See* Comments of Cingular/Verizon Wireless at 13-14.

[39] Comments of Loral at 15.

[40] Comments of Constellation at 22.

[41] *See* Comments of AT&T Wireless at 16-18; Cingular/Verizon Wireless at 12-14; CTIA at 9.

> merely because the terrestrial service operates on the same frequencies as a satellite service.[42]

The same situation prevails here and thus the ORBIT Act does not override the Commission's auction obligation.[43]

II. ARGUMENTS THAT SECTION 303(y) AND PRIOR COMMISSION POLICY SUPPORT ALLOWING TERRESTRIAL AUTHORITY FOR MSS LICENSEES ARE WITHOUT MERIT.

Several commenters rely on Section 303(y) of the Communications Act and prior FCC policy concerning flexible use to support their arguments that the FCC must afford MSS operators terrestrial authority. As shown below, these arguments are without merit.

A. MSS Terrestrial Authority Is Not Consistent With Section 303(y).

Section 303(y) of the Communications Act was added in 1997 and grants the FCC "authority to allocate electromagnetic spectrum so as to provide flexibility of use" if such an allocation is consistent with international agreements; is in the public interest; would not deter investment in communications services and systems, or technology development; and would not result in harmful interference.[44] Even if these conditions are satisfied, "new Section 303(y) of

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[42] *Amendment of Parts 2 and 25 of the Commission's Rule*s, ET Docket No. 98-206, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 F.C.C.R. 4096, 4218 (2000). The Commission also noted that terrestrial and satellite services share the 24 GHz and 39 GHz bands, and that it has awarded, or plans to award, licenses in those bands by competitive bidding. *Id.*

[43] As a final matter, there is no basis upon which to find *National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), applicable to this proceeding, for the reasons set forth in Cingular/Verizon Wireless' joint comments. *See* Comments of Cingular/Verizon Wireless at 14-15; *see also* Comments of AT&T Wireless at 19 n.45; CTIA at 9-10. None of the comments seriously challenges this conclusion.

[44] 47 U.S.C. § 303(y).

the Communications Act provides that the Commission is permitted, *but not required*, to allocate spectrum for flexible use."[45]

As both a plain reading of the statute and the legislative history make clear, Section 303(y) authorizes the Commission to provide flexible use when *allocating* spectrum.[46] Thus, Motient correctly asserts that Section 303(y) is inapplicable here.[47] The instant proceeding is not a spectrum allocation proceeding, but is instead an attempt to modify the intrinsic nature of a service shortly after awarding the initial licenses, albeit conditionally. The Commission, therefore, does not have authority to apply Section 303(y) in this context. The appropriate context in which to apply Section 303(y) would be in a proceeding to reexamine whether the original 70 MHz MSS allocation is justified in light of changed circumstances. The pending Application for Review and CTIA petitions,[48] which argue that the 2 GHz MSS licenses should be rescinded and further licensing held in abeyance until the Commission fully and finally resolves substantial and material questions of fact, provide the vehicle to commence this reexamination.

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[45] H.R. Conf. Rep. No. 105-109, 143 Cong. Rec. H6131, 6176 (1997).

[46] For example, Congress noted that, "[S]ection 303(y) only requires that the Commission specifically seek comment *in the allocation proceeding itself* on whether any proposed flexible allocation meets the criteria enumerated in Section 303(y), and make appropriate findings in the context of issuing a final decision *in the allocation* proceeding." 143 Cong. Rec. at 6176 (emphasis added).

[47] Comments of Motient/TMI at 21.

[48] *See* Petition for Rulemaking of the Cellular Telecommunications & Internet Association (filed May 18, 2001); Petition for Reconsideration of the Cellular Telecommunications & Internet Association (filed Oct. 15, 2001); Application for Review of AT&T Wireless Services, Inc., Cellco Partnership d/b/a Verizon Wireless, and Cingular Wireless LLC (filed Aug. 16, 2001).

Even assuming, *arguendo*, that Section 303(y) applies here, the record does not support a Commission finding in favor of MSS flexibility because at least one of the statutory criteria – the public interest – is absent here.[49] The Commission has already defined the public interest in its spectrum management policy to be that auctions produce those who are most willing to put spectrum to its best and highest use.[50] In the instant case, such a definition of the public interest should so govern the Commission's assessment of whether to permit terrestrial operations over MSS spectrum. Moreover, it does not serve the public interest to subsidize failing satellite companies by giving away valuable spectrum rights where there is a dearth of spectrum for the provision of advanced terrestrial mobile services. Commissioner Abernathy noted in the ITFS/MDS proceeding that "the statutory test is the 'public interest' – not solely the 'incumbents' interests.'"[51] Cingular and Verizon Wireless thus agree with CTIA that only by awarding such rights via auction can the Commission advance the public interest.[52] Otherwise, MSS licensees would receive a windfall with no guarantee of being able to provide a

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[49] Arguably several of the statutory criteria are absent. *See, e.g., infra* page 14. At a minimum the Commission has not addressed the concerns raised about the potential for interference to PCS and services in adjacent bands. Furthermore, while the grant of flexibility to MSS licensees may encourage investment in that technology, it is not clear that it would not be at the expense of investment in communications services where providers were required to purchase licenses at auction.

[50] *See Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, 14 F.C.C.R. 19868, 19870-71, 19882 (1999).

[51] *See Amendment of Part 2 of the Commission's Rules to Allocation Spectrum Below 3 GHz for Mobile and Fixed Services*, ET Docket No. 00-258, *First Report and Order and Memorandum Opinion and Order*, FCC 01-256, at 32 (rel. Sept. 24, 2001) (Separate Statement of Commissioner Kathleen Abernathy) ("*3G First Report and Order*").

[52] *See* Comments of CTIA at 8-9; *see supra* Section I.A.

commercially viable service, the U.S. Treasury likely would be deprived of billions of dollars in auction revenues, and the spectrum would not be placed in the hands of those who value it most highly.[53]

In addition, a second statutory criterion – no harmful interference – is arguably absent. While some commenters raise concerns that flexibility will result in harmful interference to 2 GHz and L-Band MSS systems[54] or other services,[55] others caution that technical information on proposed terrestrial operations is insufficient to calculate interference and that more information is required.[56] Even if the Commission were to incorrectly find that it can grant MSS licensees flexibility, such a finding cannot be made until it resolves these issues.

B. Prior Commission Policy Does Not Support a Grant of Terrestrial Authority In This Case.

Parties supporting terrestrial authority for MSS licensees maintain that such authority is consistent with prior Commission actions in allowing flexibility in the ITFS/MMDS, cellular, PCS, DARS, WCS, and 700 MHz bands.[57] Those proceedings are wholly different from the instant case. Unlike those actions, in this proceeding the Commission proposes to bolster a

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[53] Allowing MSS licensees an "end-run" around the auction statute also undermines the integrity and logic of the auction process by creating uncertainty as to the value of the spectrum, as noted by TDS. *See* Comments of TDS at 3-7. Uncertainty, in turn, deters investment, making it more difficult to obtain financing for providing innovative services to the public.

[54] *See, e.g.,* Comments of Stratos/Marinesat at 8-9; Aviation Industry Parties at 8-9; Inmarsat at 12-16; TBS at 6-7

[55] *See, e.g.,* Comments of MSTV/NAB at 15; SBE at 7-10.

[56] *See* Comments of WCD/TIA at 6-8; MSUA at 5.

[57] *See* Comments of Globalstar Bondholders at 24-27; Celsat at 10-12; Loral at 6-8; Motient/TMI at 18-20.

financially nonviable service by fundamentally changing the nature of the satellite-only service weeks after the licenses were conditionally granted. MSS is a nascent service with few customers; the service is on the verge of collapse only weeks after licensing. Awarding terrestrial service authorization under the guise of flexibility, so soon after licensing, demonstrates that licensing was premature. None of the other instances in which the Commission afforded flexibility is even remotely similar.

For example, in the ITFS/MMDS proceeding cited by MSS proponents, the Commission in part justified its decision to permit flexible use of these bands by noting that it had provided ITFS/MMDS licensees with additional operational flexibility on several instances since 1996, that providing licensees with even greater flexibility would not result in harmful interference, and that such additional flexibility would not change existing ITFS/MMDS service or technical rules.[58] The Commission cannot make such a case in the instant proceeding; there has been no prior award of flexibility because MSS is a nascent service, the record reflects serious interference concerns, and granting flexibility would require a change in technical rules.

Likewise, the circumstances surrounding the Commission's treatment of cellular and PCS licensees lends no support to the cause of terrestrial authorization for MSS licensees. The establishment of cellular service predates the advent of auctions and that service was well-established with over a decade of service to the public before the Commission introduced flexibility. Indeed, cellular licensees had the right to provide fixed services on an ancillary basis long before the Commission amended its rules to allow the provision of fixed services on a co-

[58] *See 3G First Report and Order* at ¶¶ 21, 24, 25.

primary basis with mobile services.[59] PCS licensees similarly had the authority to provide fixed services from the time they were licensed.[60] Thus, the change in the FCC's rules to allow the provision of fixed services on a co-primary basis did not represent a fundamental change in the nature of either cellular or PCS service, as such a change would in the MSS context.

Some commenters supporting terrestrial authority for MSS licensees point for support to the Commission's recent grant of special temporary authority to certain DARS licensees to operate terrestrial repeaters.[61] Again, this analogy fails. In the first place, DARS licensees, who acquired their licenses at auction, intend to use repeaters to offer simultaneously the same programming as their satellite service. Furthermore, the Commission contemplated that DARS would include a terrestrial component from the outset.[62] Similarly, the Commission allowed full

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[59] *Amendment of Parts 2 & 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, GEN Docket No. 87-390, *Report and Order*, 3 F.C.C.R. 7033, 7041 (1988); *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8965, 8968-69, 8977 (1996) ("*CMRS First Report and Order*").

[60] The Commission initially granted PCS licensees authority to offer fixed services on an ancillary basis. *See Amendment of the Commission's Rules to Establish New Personal Communications Service*, GEN Docket No. 90-314, *Second Report and Order*, 8 F.C.C.R. 7700, 7712 (1993) ("*PCS Second Report*") (subsequent history omitted). Eventually, the Commission adopted rules that allowed PCS licensees to offer fixed services on a co-primary basis. *See CMRS First Report and Order*, 11 F.C.C.R. at 8968-69, 8977.

[61] Comments of Globalstar Bondholders at 25.

[62] *See Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, IB Docket No. 95-91, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 12 F.C.C.R. 5754, 5756-59 (1997). The Commission is currently considering the potential harmful interference that terrestrial DARS will cause to services in adjacent bands. The record in that proceeding demonstrates the need to resolve interference concerns before making a flexible use determination.

flexibility in the WCS and 700 MHz bands from their initial allocations.[63] The licenses were then subject to competitive bidding pursuant to Section 309(j). In this way, parties knew from the start the essential services that were authorized. Market forces were then able to determine the most efficient use of the spectrum over time.

In contrast, the MSS spectrum allocation did not provide for a terrestrial component and licenses were not awarded by auction. The public thus did not have notice of the spectrum's value given a terrestrial component. It cannot be seriously argued that the results of the assignment process would have been the same if interested parties had been given an opportunity to apply for terrestrial licenses. To the contrary, lack of notice distorted the market's ability to make an efficient allocation of spectrum. The Commission's treatment of DARS, WCS, and licensees in other auctionable services does not support flexible use for MSS. If anything, the circumstances surrounding these prior policy decisions illustrate that the Bureau licensed spectrum for MSS prematurely.[64]

III. THE COMMENT RECORD LENDS FURTHER SUPPORT THAT THE COURSE OF PROCEEDINGS TO DATE IS UNREASONED.

The comment record fails to overcome the unreasoned and arbitrary course of 2 GHz MSS licensing proceedings to date. First, the International Bureau dismissed evidence *by*

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[63] *See PCS Second Report*, 8 F.C.C.R. at 7712; *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, GN Docket No. 96-228, *Report and Order*, 12 F.C.C.R. 10785 (1997); *Service Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, *First Report and Order*, 15 F.C.C.R. 476 (2000).

[64] *See also* PFF at 8 ("The absence of a market-based approach to spectrum allocation in this case is especially unfortunate."). Prior policy in the DARS and WCS proceedings also illustrates the danger of not resolving interference concerns prior to an award of flexible use. *See supra* note 62.

applicants that MSS is not a commercially viable service, deciding instead to license applicants so they can succeed or fail "on their own merits."[65] Three weeks later the FCC adopted the *Flexible Use Notice*, proposing to fundamentally change the nature of MSS licenses to "assure the commercial viability of MSS." [66] It is not reasoned decisionmaking to allow the market to decide the future of a service and then only *three weeks later* propose to change the rules to bolster its ability to succeed, particularly when proceeding in such a manner forecloses the ability of other service providers to put such spectrum to its highest and best use.[67] As several commenters note, MSS providers have long known that MSS is a satellite-only service and that full coverage in urban and terrain-challenged areas is not possible.[68]

The unreasoned course of the proceedings is highlighted by the comments of the satellite community, providing even more evidence that the satellite licensees want flexibility as a solution to the plain fact that they are not viable without it – undercutting the legality of the FCC's decision to license them in the first place. For example:

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[65] *E.g., ICO Services*, DA 01-1635 at ¶ 31.

[66] *Flexible Use Notice* at ¶ 25.

[67] *See* 5 U.S.C. §706(2)(A); *see, e.g., Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998); *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995).

[68] *See, e.g.*, Comments of Aviation Industry Parties at 7 ("The problems encountered by the domestic mobile satellite systems in serving urban areas were anticipated by Motient's predecessors as early as 1985 . . . ."); SBE at 2 ("New ICO, and other MSS proponents, knew full well that MSS was a satellite-based service. . . . No matter how hard . . . New ICO tries to bend the laws of physics, 'full coverage' from low earth orbit satellites alone is not possible in urban or terrain-challenged areas. Putting lipstick on a pig never changes the inherent nature of the beast.").

- Motient, now joined by TMI, reiterates that terrestrial service "is critical to making MSS a vital and viable nationwide mobile service." Comments of Motient/TMI at i. Motient further contends that an MSS business that can succeed without terrestrial operations "is the exception rather than the rule." *Id*. at 12.

- Likewise, New ICO emphasizes that terrestrial authority "is critical for MSS" and is necessary "to ensure the vitality of MSS networks." Comments of New ICO at 2, 6. New ICO further notes that given the weak capital markets, terrestrial authority "is even more important . . . to make their MSS systems fully and economically viable." *Id*. at 2, 3. New ICO specifically states that it should not be relegated "to serving *only* the less profitable rural areas," *id*. at 4, despite the fact that its license was granted based upon the public interest benefit of serving rural areas.

- The Unofficial Bondholders Committee of Globalstar state that terrestrial authority is necessary to put Globalstar "on sound financial footing" and to break the industry as a whole out of the "financial doldrums" that have plagued the industry thus far. Comments of Globalstar Bondholders at 17. It specifically acknowledges that, as licensed, "it is unlikely that Globalstar will be able to raise sufficient capital to launch its second generation satellite constellation." *Id*. at v.

- Loral, the largest equity owner in Globalstar, acknowledges that terrestrial authority is necessary to "bolster the viability of MSS systems." Without it, "some of the licensed MSS networks may not come to fruition, while other MSS operators may not attain the subscriber levels that will allow them . . . to offer . . . service and support to underserved areas." Comments of Loral at 2, 4-5.

- Celsat admits that without terrestrial authority, "spectrum will lie fallow." Comments of Celsat at 9.

- MCHI claims that "[I]t has been difficult for the MSS industry to attract capital" and that terrestrial authority "will assist MSS providers to obtain additional financing." Comments of MCHI at 10-11.

These admissions not only by New ICO and Motient, but also by other MSS licensees, augment what was already on file with the Commission prior to licensing – that absent government intervention in the market in the form of a fundamental license change, MSS is not viable, cannot provide the service upon which it was predicated, and will allow spectrum to lie fallow. Moreover, the record shows that even with the terrestrial authority sought by Motient

and New ICO, the promised benefits of MSS are unlikely to materialize, as the statements of another MSS provider, Iridium, demonstrate:

> [A]doption of ICO's proposal for the 2 GHz band would not result in the public benefits proffered by ICO. Rather, the end result most likely would be the effective monopolization of the 2 GHz MSS band, and the *de facto* reallocation of that spectrum for terrestrial use, by ICO and its affiliate, Nextel Communications ("Nextel").
>
> If ICO's proposal (or some close variation on that theme) is adopted, the Communication will all but ensure that few, if any, of the recently authorized 2 GHz MSS systems will ever be built. Without an existing terrestrial infrastructure and customer base (such as is possessed by Nextel) or a business plan targeting a separate market niche (and supported by deep corporate "pockets"), it is all but inconceivable that funding will be available for new MSS entrants. . . . A successful 2 GHz MSS/ATS business plan will have to attract not only the capital to build and launch a satellite system, but to build out a terrestrial network infrastructure as well, including the development of, *inter alia*, dual-mode handsets to operate in this new band. It is unclear why any rational investor would seek to compete against Nextel's entrenched position in this market.
>
> Rather, potential investors will see the ICO proposal as exactly what it is: an opportunity for ICO/Nextel and no one else. Nextel will be able to acquire perhaps 50 MHZ (or more) of highly valuable nationwide spectrum for its existing terrestrial network – spectrum that will enable it to achieve a nationwide terrestrial "footprint" – without having to compete for that spectrum at auction. . . . Giving Nextel the ability to leverage its unique incumbent terrestrial status – to essentially monopolize the 2 GHz MSS band – will guarantee both ICO's success (albeit perhaps not as an MSS operator) and the stillbirth of most, if not all, of its would-be competitors.
>
> Such an outcome cannot possibly be squared with the public interest. . . .[69]

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[69] Comments of Iridium at 2-3 (footnote omitted). Iridium also notes that "[t]hose potential investors with a sense of history will see this as a variation on Fleetcall's (Nextel's original name) scheme that converted private SMR spectrum to CMRS spectrum without the
(continued on next page)

Together, these facts reemphasize that the FCC must resolve the substantial and material questions of fact concerning the viability of MSS, and whether the full 70 MHz MSS allocation remains justified or should be reallocated to a higher and more efficient use, by acting on the pending Application for Review filed by the Wireless Carriers and the CTIA petitions. Until these issues are fully and finally resolved, consideration of the issues raised in the *Flexible Use Notice* is premature.[70]

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inconvenience of competing applications." *Id.* at 3 n.6. Iridium's concerns may be equally applicable to Motient which, like New ICO, is already affiliated with terrestrial wireless operations. *See* Comments of AT&T Wireless at 7; CTIA at 13.

[70] Agencies do not have unbridled discretion to order their proceedings where the factual assumptions for a rule or decision are no longer valid or the public interest is subverted by prejudging issues which are subsumed by taking issues out of order (*e.g.*, licensing decisions made prior to resolving spectrum allocation). *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995) (citing *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992)).

CONCLUSION

Cingular and Verizon Wireless submit that, for the reasons stated above and in their joint comments, the proposed authorization of terrestrial operations only to MSS providers is contrary to Section 309(j) of the Communications Act, and nothing in the ORBIT Act undermines this conclusion. It is also not reasoned decisionmaking to consider the issues raised in the *Flexible Use Notice* at this time. The Commission must first fully and finally resolve the threshold question of whether the original 70 MHz of spectrum allocated to 2 GHz MSS remains justified where the factual predicate for the allocation has been undermined by applicants' admissions that MSS is not viable, particularly given the competing immediate spectrum needs of terrestrial mobile carriers.

Respectfully submitted,

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